United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

NO. 74-2189

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN WINSTON ONO LENNON,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF DEPORTATION ORDER

PETITIONER'S REPLY BRIEF

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The government's brief strikingly avoids our two initial contentions, which are made in the first fifteen substantive pages of the argument section in our brief (Br. for Pet. 11-26). Our points were, we believe, clearly stated, and the absence of any response indicates, we submit, that the arguments are not readily answered.

1. We argued first that Mr. Lennon's British conviction did not satisfy the "*illicit* possession" requirement of Section 212(a) (23) because the Dangerous Drugs Act of 1965, as authoritatively construed by the British courts, does not require proof that the defendant knew the unlawful *nature* of the matter in his possession. The government responds by saying that Mr. Lennon's possession must have been

"illicit" because he was convicted under British law (see Resp.Br. at 11-12), and that the British cases require "mens rea" and impose "substantial knowledge requirement" so that "innocent" people cannot be convicted (Resp. Br. 11, 12-14). The responses misunderstand the argument and miss the point.

First, the condition that possession be "illicit" — prescribed by Section 212(a) (23) — cannot be satisfied merely by proof of the conviction. *Every* conviction, by definition, involves a violation of the law. If Congress were intending to have such proof be sufficient, it should simply have declared as ineligible any alien "convicted of a violation of . . . any law or regulation relating to the possession of or traffic in narcotic drugs or marihuana . . . ." The fact of *conviction* would then have established that the possession was "illicit." By adding the word "illicit" before the word "possession," Congress imposed an additional requirement beyond *Webster's* definition as "not allowed by law."

Second, we did not question the conclusion that British law imposes a "substantial knowledge requirement" (or *mens rea*). We noted, however (Br. for Pet. 20), that "the question is 'knowledge of what?' " And we added that there was a clear distinction between "(1) knowledge that a substance is in the defendant's possession and (2) knowledge of the character of the substance" (*id.* at 19). Not one word or phrase in the government's brief discusses the second of these forms of knowledge, and the government apparently does not take issue with our analysis, in this regard, of the British precedents.

If the Dangerous Drugs Act of 1965, as construed by the British courts, does not require proof that the defendant knew the character or nature of what he possessed, it is, simply, not a law "relating to the illicit possession of . . . marihuana." Our authorities indicate that this form of

knowledge is generally required in this country, as acknowledged by the Board of Immigration Appeals, and the government cites no decisions to the contrary.

2. Our second argument was that, on the *record made in this case*, the Special Inquiry Officer could not lawfully find that cannabis resin — which Mr. Lennon pleaded guilty to having possessed — was marijuana. The applicable statute forbids the Special Inquiry Officer to go beyond the four corners of the record made before him (8 U.S.C. § 1226 (a)) and the applicable rules of administrative law are consistent with the statute. The government's brief, on the other hand, deals neither with the statute we quote nor with the administrative law principles. Instead, the government argues that the word "marihuana" was added in 1960 to cover the cases — previously outside the reach of the law — where possession of marijuana had been proved (Resp. Br. 15). This, of course, begs the question as to what marihuana is, and whether that word covers the substance possessed by Mr. Lennon.[1]

The government also argues, quite surprisingly, that in other statutes enacted before 1960, Congress dealt with marijuana transactions, "and in each of those statutes marihuana was defined as including cannabis resin" (Resp. Br. 16). But the specific enumeration of cannabis resin in the other laws proves, if it proves anything, that when the word "marihuana" was used without such an all-embracing definition in the Immigration and Nationality Act it did *not* include those substances which had to be specifically enumerated to be covered by the earlier laws.

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[1] We do not agree with the government's conclusions from the legislative history, and our understanding of that history is reflected in our brief to the Board of Immigration Appeals. For purposes of our argument here, however, the sole issue is what *this record* reflects, not inferences that might be drawn from the legislative history.

3. The government goes on to argue that no remand for a hearing under 18 U.S.C. § 3504 is appropriate because no evidence that was improperly obtained was — or could have been — used against Mr. Lennon. In a footnote, the government asserts that the Section 3504 claim was dismissed by District Judge Owen on January 2, 1975. What the government fails to mention is that Judge Owen's decision stated as follows with regard to the Section 3504 claim (387 F. Supp. 561, 563 (emphasis added)):

> In any event, and more fundamentally, plaintiff's claim has already been presented both to the Immigration Judge and the Board which have the power and means to fully protect plaintiff's rights under 18 U.S.C. § 3504. In re Lennon, *supra*, at 5-6 and cases cited therein. *Any error in the Board's ruling as to this contention is reviewable in the Court of Appeals* and not in collateral proceedings in the District Court.

In short, Judge Owen dismissed the claim in large measure because he viewed this Court as the proper forum. It is startling that the government now maintains that Judge Owen's action is a reason for this Court to deny the claim.

4. The government's brief initially misstates our argument that Mr. Lennon was "selectively" or "discriminatorily" treated in various aspects relative to his immigration status (Resp. Br. 18-21), and then — when it finally recognizes the applicability of this Court's recent decision in *United States* v. *Berrios*, 501 F.2d 1207 (2d Cir. 1974) — it avoids the obvious application of that case to the facts underlying Mr Lennon's immigration difficulties (Resp. Br. 23-27).[2]

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[2]Although the government focusses on the rulings regarding the denial of nonpriority status and the institution of deportation proceedings (Resp. Br. 18), our brief pointed out various other decisions

(continued next page)

We do not, of course, argue that there are hard and fast statutory or regulatory standards governing nonpriority status or the decision whether or not to institute deportation proceedings.[3] There is, of course, a certain amount of discretion which the immigration authorities must exercise in making either decision. But, as this Court observed in *Berrios*, "[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, *or control over the defendant's exercise of his constitutional rights*, as the basis for determining its applicability." 501 F.2d at 1209 (emphasis added).

When evidence began to emerge regarding the discriminatory nature of the District Director's actions in the Lennon case, the Board of Immigration Appeals was asked to remand the pending appeal to permit a full record to be made on the issue. It denied that motion and proceeded to consider the appeal (App. 306-313). Thereafter, it ruled that it lacked jurisdiction to review the "prosecutorial discretion" decisions made by the District Director (App. 343-345). We contend that this jurisdictional ruling was erroneous, and that — even if this Court were to disagree with our initial arguments which would

(Footnote 2, continued)

— including the abrupt revocation of voluntary departure status — which were, in our view, prompted by impermissible and unconstitutional reasons (Br. for Pet. 27). Our claim is that discriminatory treatment pervaded the entire case of John Lennon, not that it was limited to one or two critical decisions.

[3]On the other hand, the District Director is compelled, under the applicable Operating Instruction, to grant nonpriority status when "humanitarian circumstances" exist. The internal regulation reads as follows (Operations Instructions § 103.1(a)(1)):

> In every case where the District Director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for nonpriority.

establish Mr. Lennon's right to remain here as a permanent resident — there must at least be a remand for full exploration of the selective prosecution question.

It is no answer to this argument to state — as the government does at length — that there were 3375 aliens deported for overstay in the United States in 1971-1972, and 3008 in 1972-1973, and some 58,000 others left without formal deportation proceedings (Resp. Br. 24). The issue is not whether other individuals have been proceeded against but whether Mr. Lennon was singled out for this treatment because he had exercised First Amendment rights and because the authorities were concerned he would exercise First Amendment rights in the future.

The kind of evidence that would emerge on this subject if a full hearing were held in an appropriate forum has begun to come out in the civil case of *Lennon* v. *United States*, S.D.N.Y., No. 73 Civ. 4543, which had to be instituted in federal court because no remedy was provided by the Immigration and Naturalization Service. Attached to this brief as Appendices I-V are documents that have already been produced in that case since the filing of this appeal. They indicate that Senator Strom Thurmond sent to former Attorney General Mitchell a report of the Senate Internal Security Subcommittee which reflected concern that Mr. Lennon would engage in political activities critical of former President Nixon. Senator Thurmond suggested in his letter of February 4, 1972, that "many headaches might be avoided if appropriate action be taken in time." Thereafter, on February 14, then Deputy Attorney General Kleindienst sent the letter and memo to the Commissioner of the Immigration and Naturalization Service asking whether there was "any basis to deny [Lennon's] admittance." A scribbled notation indicates that on February 15, the Commissioner "advised the D.A.G. [Deputy Attorney General] facts in case." Two weeks later, on March 2, 1972, the District

Director was instructed in a phone call from Washington by an Associate Commissioner of the Immigration and Naturalization Service that he should "immediately revoke the voluntary departure granted to John Lennon and his wife." Instructions were given to begin deportation proceedings immediately. The District Director was told that "under no circumstances" should he approve the petition to classify Mr. Lennon as an outstanding artist (which he plainly is). This was given as "a direction of Commissioner Farrell personally."

It is hard to imagine more compelling *prima facie* proof that the INS actions regarding Mr. Lennon, which began on or about March 1, 1972 (App. 203), were motivated by constitutionally impermissible considerations. The government's claim that "invidious discrimination" or "bad faith" is rebutted by the fact that Mr. Lennon had *previously* been granted "waivers of excludability" and "discretionary extensions of his lawful stay" (Resp. Br. 25) does not address the situation in March 1972, when a Senator who had recently become aligned with the Republican party advised the then-President's chief political counselor — who also happened to be Attorney General — that Mr. Lennon's political views and the support he might gather for them could embarrass the Republican party. From that time on, there is substantial reason to believe that official governmental action was based principally on a desire to silence political opposition squarely protected by the First Amendment.[4]

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[4]The government erroneously states at the outset of its argument that Mr. Lennon is "admittedly deportable as an overstay immigrant" (Resp. Br. 10). No such admission has been made here or below. Deportability as an overstay was contested before the special inquiry officer on the ground that the revocation of voluntary departure was improper. Particularly in view of the discriminatory nature of the hasty decision to classify Mr. Lennon as an "overstay," no weight should be given to that INS characterization.

With regard to the claim for nonpriority status, the government also asserts that we could cite "only five cases out of approximately 1,800 decisions . . . as being helpful to [our] position" (Resp. Br. 20, n.*). In fact, we selected only the most aggravated illustrations of hardened and repeated narcotics violators who have been permitted to stay in the United States. There are, in the group of over 1800 cases, more than 150 narcotics convictions ranging from simple possession of marijuana to commercial traffic in heroin. One illustrative case, parallel to Mr. Lennon's, involves an individual who was convicted of transporting marijuana. His wife was a permanent resident of the United States and a child was a citizen. The individual was described as a man "of good character" and the separation of the family would be a serious hardship. Other cases could be cited, and our failure to do so should not be taken as an indication that they do not exist.[5]

5. The British Rehabilitation of Offenders Act affected Mr. Lennon's conviction as of July 1, 1975, and directed that, as of that date, he was to "be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offense or offenses which were the subject of that conviction . . . ." We urged in our brief that this statutory directive should have the same consequences for the INS as the California expungement provision which the Immigration Service treated as wiping out a narcotics conviction in *Matter of Andrade*, Int. Dec. #2276 (1974). Our conclusion was that, "at the very least, therefore, this case should be remanded so that the Board may fully consider the effect of the law on petitioner's present status" (Br. for Pet. 38).

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[5] Nor is this claim rendered moot— as the government appears to suggest (Resp. Br. 4, n.*) — by the Immigration Service's belated willingness to consider nonpriority status. Even if nonpriority status were granted, it would not affect Mr. Lennon's right to permanent residence or wipe away other discriminatory actions such as the deportation proceeding.

The applicability of the law is, in the first instance, a question of policy for the Immigration and Naturalization Service. The decided cases did not squarely control the Board of Immigration Appeals' decision in *Andrade*. Yet, at the suggestion of the Solicitor General, the Service made the *policy* decision — promptly communicated to the Board —to follow the position "that marijuana violators who are treated as youth offenders under state laws will be dealt with in the same manner as such offenders under federal law." Similar questions of policy are presented with regard to marijuana violators whose convictions are expunged under foreign law, and we ask only, in this regard, that this case be remanded to the Board so that it may assess the policy considerations and obtain from the Service a considered statement of position in light of *Andrade*. Such relief would be appropriate, of course, only if the Court were to disagree with all our other contentions.

CONCLUSIONS

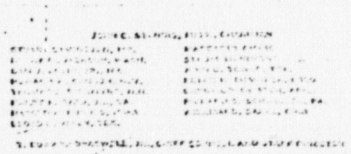
For the foregoing reasons, together with those stated in our principal brief, the decision of the Board of Immigration Appeals should be vacated and reversed.

Respectfully submitted,

LEON WILDES
Attorney for Petitioner
515 Madison Avenue
New York, New York 10022
(212) 753-3468

Of Counsel:
NATHAN LEWIN

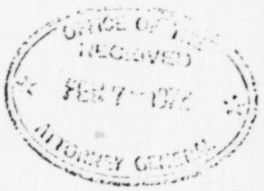
Appendix I



United States Senate

COMMITTEE ON ARMED SERVICES
WASHINGTON, D.C. 20510

February 4, 1972



PERSONAL AND CONFIDENTIAL

Honorable John N. Mitchell
Attorney General
Department of Justice
Washington, D. C.

Dear John:

Find attached a memorandum to be from the staff of the Internal Security Subcommittee of the Judiciary Committee. I am a member of the subcommittee as well as the full Judiciary Committee.

This appears to me to be an important matter, and I think it would be well for it to be considered at the highest level.

As I can see, many headaches might be avoided if appropriate action be taken in time.

With kindest regards and best wishes,

Very truly,

Strom Thurmond

ST:x

Enclosure

I also sent Bill Timmons a copy of this memorandum.

Appendix II

January 26, 1972

MEMORANDUM FOR THE FILES

SUBJECT: John Lennon

FROM: Jack Norpel

(cc: Thomas L. Hughes; Carnegie Foundation; Finances; California; Communes; Anarchy)

John Lennon, a former member of the British music group known as The Beatles, and his wife Ono, entered the United States in the latter half of 1971 at the Virgin Islands. Lennon was reportedly born September 10, 1940, in England.

A commune group from Washington, D. C., is to transfer to California in preparation for disrupting the Republican Convention later this year.

A confidential source has learned that the activities of this group are being financed by Lennon. The group is now said to be in New York City for training and preparation for disruption of the convention.

Another Government source confidentially advised that Lennon's visa was of interest to Thomas L. Hughes, former head of the INR in the State Department and now Director of the Carnegie Foundation; to one L. Mathias who wrote a letter to the State Department on January 14, 1972; and to Congressman Bingham of New York.

EXHIBIT B

Appendix III

JOHN LENNON

John Lennon, presently visiting in the United States, is a British citizen. He was a member of the former musical group known as "The Beatles." He has claimed a date of birth of September 10, 1940, and he is presently married to a Japanese citizen, one Yoko Ono.

The December 12, 1971, issue of the New York Times shows that Lennon and his wife appeared for about 10 minutes at about 3:00 a.m. on December 11, 1971, at a rally held in Ann Arbor, Michigan, to protest the continuing imprisonment of John Sinclair, a radical poet.

Radical New Left leaders Rennie Davis, Jerry Rubin, Leslie Bacon, Stu Albert, Jay Craven, and others have recently gone to the New York City area. This group has been strong advocates of the program to "dump Nixon." They have devised a plan to hold rock concerts in various primary election states for the following purposes: to obtain access to college campuses; to stimulate 18-year old registration; to press for legislation legalizing marijuana, to finance their activities; and to recruit persons to come to San Diego during the Republican National Convention in August 1972. These individuals are the same persons who were instrumental in disrupting the Democratic National Convention in Chicago in 1968.

According to a confidential source, whose information has proved reliable in the past, the activities of Davis and his group will follow the pattern of the rally mentioned above with reference to John Sinclair. David Sinclair, the brother of John, will be the road manager for these rock festivals.

Davis and his cohorts intend to use John Lennon as a drawing card to promote the success of the rock festivals and rallies. The source feels that this will pour tremendous amounts of money into the coffers of the New Left and can only inevitably lead to a clash between a controlled mob organized by this group and law enforcement officials in San Diego.

The source felt that if Lennon's visa is terminated it would be a strategy counter-measure. The source also noted the caution which must be taken with regard to the possible alienation of the so-called 18-year old vote if Lennon is expelled from the country.

EXHIBIT A

Appendix IV

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

February 14, 1972.

MEMORANDUM TO: HON. RAYMOND F. FARRELL
COMMISSIONER, IMMIGRATION &
NATURALIZATION SERVICE

FROM: RICHARD G. KLEINDIENST
DEPUTY ATTORNEY GENERAL

RE: ATTACHED

Ray, Please call me about the attached. When is he coming? Do we -- if we so elect -- have any basis to deny his admittance?

RGK:tl

RECEIVED
FEB 15 1972
ASSOCIATE COMMISSIONER
OPERATIONS

On 2/15/72 Mr Farrell advised the D.A.G. [illegible] in conv. [illegible]

Appendix V

March 2, 1972

MEMORANDUM FOR FILES:

Re: John LENNON - A17 527 321 (Conf.)
Yoko Ono LENNON - A19 469 154 (Conf.)

Associate Commissioner Greene telephonically advised today that we should immediately revoke the voluntary departure granted to John Lennon and his wife. An O.S.C. should be issued for both aliens and served upon them with a return date of March 16, 1972.

Mr. Greene further stated that under no circumstances should this office approve the I-485 filed by Vernon. This is a direction of Commissioner Hurwell personally. Further action on the petition will therefore not be taken unless cleared by the undersigned with Mr. Greene.

Mr. Splvack has been advised.

SOL MARKS
District Director
New York District

cc: Mr. Splvack

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 1975, I caused two copies of Petitioner's Reply Brief to be mailed by first class mail, postage prepaid to Counsel for Respondent, Ms. Mary McGuire, Esq., Special Assistant U.S. Attorney, One St. Andrews Place, New York, New York, 10007.

Nathan Lewin

NATHAN LEWIN